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LEGAL RELATIONSHIP BETWEEN ILLEGITIMATE CHILDREN AND THEIR BIOLOGICAL FATHER

The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law

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Abstract: In Indonesia, children born out of wedlock only have legal relationship or family lineage relationship with their mother and mother's family, not with their biological father and biological father's family. This provisions of law are arranged in Article 43 paragraph (1) of Marriage Law No. 1 of 1974 which is highly influenced by Shafi'ite School of Islamic jurisprudence. Through judicial review of Aisyah (Machica) Mochtar and her son named M. Iqbal Ramadhan, Constitutional Court has agreed to waive the provisions by means of the Decree Number 46/PUU-VIII/2010 with legal consideration that the concerned article contravenes the Constitution, then it creates new legal norm which states those children have legal relationship and family lineage with their mother and mother's family and also the man who is their father. The Decree sparks controversies concerning the term 'children born out of wedlock' and 'legal relationship' in the decree. Contrary to many law experts, the article argues that the term 'children born out of wedlock' simply means children born from zina (adultery or fornication). Thus, 'legal relationship' only refer to limited relationship between both parties.

Keywords: Illegitimate children, Indonesian law, Islamic law.

Introduction

In Indonesia, children born out of wedlock so far have been seen to have legal relationship with their mother and mother's family only. That legal norm is clearly arranged in Article 43 paragraph (1) of Law Number 1 of 1974 regarding Marriage. The concerned provisions of

law, have the meaning that “*Children born out of wedlock do not have legal relationship with their biological father and biological father’s family*”.

After the judicial review of Aisyah (Machica) Mochtar and her son named M. Iqbal Ramadhan, the legal dictum of Article 43 paragraph (1) is waived by Constitutional Court through its decree Number 46/PUU-VIII/2010 which states that “*Article 43 paragraph (1) contravenes the Constitution of State of Republic of Indonesia of 1945 conditionally (conditionally unconstitutional) which is unconstitutional as long as the concerned paragraph is interpreted that it removes the legal relationship with the man which can be proven with knowledge and technology and/or other tools which can prove that legally they have blood relation as father and children*”. It means that Article 43 paragraph (1) is declared null and void. Besides waiving Article 43 paragraph (1), Constitutional Court also creates new legal norm in form of “children born out of wedlock have legal relationship with their biological father and biological father’s family as long as it can be proven with knowledge and technology and/or other means which legally can prove that the illegitimate children have blood relation with their biological father.

The Decree of Constitutional Court sparks controversy among legal community in Indonesia. It creates disagreement among experts of Islamic law,¹ among experts of conventional law, and between experts of Islamic law and experts of conventional law.² Those controversies are focused on the following questions: (1) how does the decree define the term out of wedlock?; (2) how does the decree define the term illegitimate children?; (3) how far is the legal relationship between the illegitimate children and their biological father meant by Constitutional Court decree?

Predictably, the answers to those questions are controversial. The answers are hypothesized as follows: (1) the term ‘Out of wedlock’ in the decree of Constitutional Court is defined as the condition of the existence of biological (sexual) relationship without wedlock. So, it is not a legal marriage which is registered; (2) the term Illegitimate Children in the decree of Constitutional Court is defined as children born out of wedlock or children born before 180 days (6 months)

¹ They are those who are expert in traditional Islamic law as derived from the Holy Quran and prophet tradition as well as from interpretation of muslim jurists in the past.

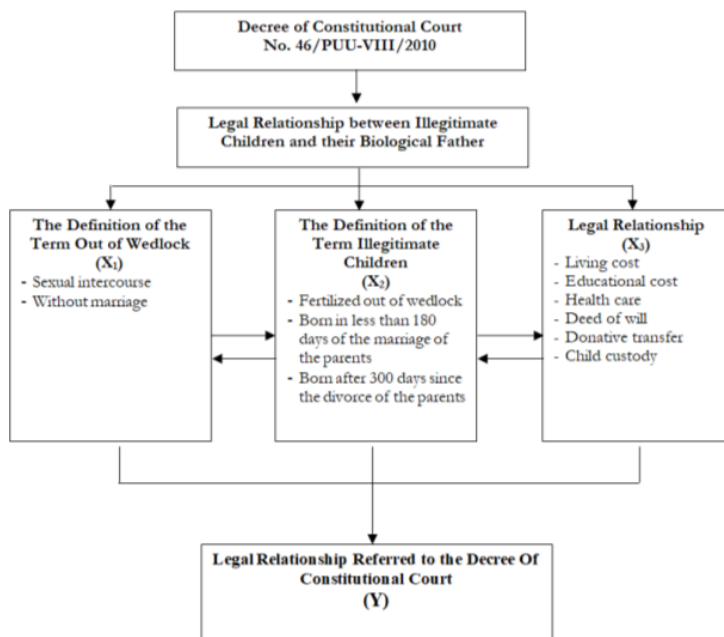
² They are those who are expert in Indonesian law as inherited from Dutch law, which is basically under the tradition of civil law.

counted from the marriage of the parents or more than 300 days (10 months) counted from the separation of the parents. Thus, children of unregistered marriage are not counted as illegitimate children; (3) the scope of legal relationship between illegitimate children and their biological father referred to in the decree of Constitutional Court includes living cost, educational cost, healthcare, custody and deed of will, and donative transfer.

This paper is aimed at discussing those problems. The approach used is deductive reasoning in order to describe the findings. The research technique is performed by exploring and comparing various related rule of law (normative juridical) and doctrines of Islamic law schools and scholars as well as conventional law experts.

Conceptual Framework

As the issue is quite complex, problems to be discussed and arguments constructed are described through conceptual framework below.



Conceptual framework chart above is designed based on the decree of Constitutional Court, doctrines of law, and the opinion of law experts, both among Islamic law scholars and among conventional law scholars.

The decree of Constitutional Court No. 46/PUU-VIII/2010 waives Article 43 paragraph (1) of Marriage Law. It states that “Children born out of wedlock do not have legal relationship with their biological father and biological father’s family”. Constitutional Court changes this by stating that “Children born out of wedlock have legal relationship with their mother and mother’s family and also with the man who can be proven as their father by knowledge and technology and/or other means, including legal relationship with the father’s family” by reason that the legal norm in Article 43 paragraph (1) Law No. 1 of 1974 contravenes the 1945 Constitution.

The decree of Constitutional Court establishes legal relationship of illegitimate children with their biological father and with biological father’s family as long as it can be proven using knowledge and technology (such as DNA test) and/or other evidence which can prove that they have blood relation. This legal relationship between illegitimate children and their biological father and their biological father’s family comes in form of financial matters (living cost, educational cost, healthcare, deed of will, donative transfer) and child custody. Illegitimate children in the decree are children fertilized out of wedlock. They are born before 180 days (6 months) of the marriage or born after 300 days (10 months) of the divorce. Therefore, children born from unregistered marriage as in M. Iqbal Ramadhan case, one of judicial review appellant in the decree of Constitutional Court No. 46/PUU-VIII/2010 is arguably not one of the categories of illegitimate children.

Here, I see that if indeed the term illegitimate children and the scope of legal relationship between the illegitimate children and their biological father and with biological father’s family explained above are what the decree intends to state, then it means or it brings consequence that the legal relationship referred to in the decree of Constitutional Court No. 46/PUU-VIII/2010, is legally and substantially true.

The term 'Out of Wedlock' in the Constitutional Court Decree

Admittedly, the fact that the Constitutional Court does not define specifically and explicitly what actually the term 'out of wedlock' means in the decree No. 46/PUU-VIII/2010 leads to controversy. The lack of definition causes various interpretations among the law experts. The decree of Constitutional Court annuls Article 43 paragraph (1) Law Number 1 of 1974 regarding Marriage which contains legal norm "*Children born out of wedlock have legal relationship only with their mother and mother's family*" on the basis of legal consideration that "the concerned article contravenes 1945 Constitution conditionally (*conditionally unconstitutional*). This is unconstitutional only if that paragraph is interpreted as removing the legal relationship of the children with the man which can be proven with knowledge and technology and/or other evidence as the biological father"³. At the same time Constitutional Court replaces the concerned legal norm into the new one as follows "*Children born out of wedlock have legal relationship with their biological father as long as it can be proven with knowledge and technology and/or other evidence which prove their blood relation*"⁴.

In the decree of Constitutional Court, one of the key word is "born out of wedlock". That key word creates different interpretation from the law experts because of lack of definition of term 'out of wedlock'. In addition the term 'out of wedlock' directly related to the stipulation in Article 2 paragraph (1) and (2) of the Marriage Law which state (1) "*Marriage is legal if it is done based on the law of their religion or belief*", and (2) "*Each marriage is registered based on the regulation of the applicable law*"; In this case, *Judicial review appellant*, Machica Muchtar, has unregistered marriage with Moerdiono and her son M. Iqbal Ramadhan is child from unregistered marriage.

Different interpretation is unnecessary if the marriage that has fulfilled the requirements of Article 2 paragraph (1), just like the appellant's marriage, can be declared as legal. In other words, if all agree that the legality of the marriage is determined by the requirements based on the religion, not the registrations as how it is arranged in Article 2 paragraph (2), the marriage of Machica will not be considered problematic and will be accepted by the state as legal. This is because the registration does not influences the legality of the

³ The Decree of Constitutional Court Number 46/PUU-VIII/2010, p. 37.

⁴ Ibid.

marriage; it merely functions as an administrative requirement. This is made clear by Akil Muchtar, then a judge of Constitutional Court, that children born from the marriage which fulfills the requirements in Article 2 paragraph (1) are legal children because Article 2 paragraph (1) arranged that “A marriage is to be declared as legal if it is held in accordance with the stipulations of the religion”. So, the registration of the marriage does not influence the legality of a marriage but as the administrative requirements. Therefore, the legality of a marriage is determined by the requirements set by the religions believes of the people who get married. Akil Muchtar asserts that in the review and test of article 2 paragraph (2) Law of Marriage, Constitutional Court argues that (1) the registration of the marriage is not a factor which determines the legality of a marriage. The marriage is legal if it has been held according to the requirements set by the religions believed by both bride and bridegroom; and (2) the registrations is an administrative requirement which is required by law⁵. In other word, Constitutional argues that unregistered marriage is also a legal marriage. Just because it is not registered in the administrative records of the state, does not mean that the marriage is not legal.⁶ However, what makes it complex and problematic is that there is also a commonly held opinion that the registration does determine the legality of a marriage in Indonesia. This opinion is shared by many, including legal experts and practitioners.

Based on interpretation by Constitutional Court as expressed by its judge Akil Mukhtar, it is clearer that the term out of wedlock as referred in the decree of Constitutional Court is defined as a solely biological relationship without any wedlock, or usually called as adultery. So the decree actually does not categorize a biological relationship based on unregistered marriage as out of wedlock. In this regards, Mahfud MD, then the chief judge of Constitutional Court, also suggests that, by this decree, Machica Muchtar’s son is a legal son of Moerdiono⁷. He asserts that since the beginning, Machica Muchtar’s

⁵ Constitutional Court of Republic of Indonesia, *Keadilan Anak Di Luar Nikah*, Constitutional Court Magazine, No. 61 (February 2012), p. 3.

⁶ Ibid.

⁷ Erlina, “Access To Justice ‘Anak Di Luar Perkawinan’ (Analisis Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/ 2010 Tentang Pengujian Pencatatan Perkawinan dan Status Hukum Anak yang Dilahirkan dari Perkawinan yang Tidak Tercatat Undang Undang Nomor 1 Tahun 1974 Tentang Perkawinan),” *Journal of*

son is legal son from Islamic perspective because the marriage was conducted based on Islam as required in Article 2 paragraph (1).

In relation to this, Islam itself also has set specific regulations on children out of adultery or *zina*, which is a major sin in Islam. It precisely states that children from adultery or children born without parents or out of wedlock only have family lineage with their mother. There is no lineage with their biological father and this has been explained by several texts. One of the most famous one is the hadith. However, since adultery is a major sin, prohibitions as explained in *al-Qur'an* are made so that everyone guard themselves (to avoid adultery), and to avoid negative effect caused by the prohibitions set by Allah as stated in *al-Qur'an*.

One of the consequences of adultery is the children born from it. Here, even though *fiqh* (Islamic jurisprudence) does not define legal children precisely; *fuqaha* (*Muslim jurists*) give definition on children from adultery as the opposite of legal children. They define children from adultery as children born by their mother from illegal relationship. It is important to note that what term illegal means in Islam is the adultery, no correlation at all with registration of marriage by the state. Meanwhile, *li'an* (mutual repudiation)⁸ children are children who legally do not have legal relationship with their father, after a husband and wife does the *li'an* one another with clear accusation.⁹

Constitutional, PSHK Universitas Islam Indonesia Cooperate with Constitutional Court of Republic of Indonesia, Volume I, No. 1 (November 2012), p. 51.

⁸ *Li'an* is a Quranic institution governing cases in which a husband accuses his wife of adultery without supplying witnesses. Quran 24:6–9 explicitly instructs the husband to swear four times that his accusation is true, followed by a fifth oath in which he invokes the wrath of God upon himself if he is lying. The wife may then neutralize this claim by responding with four oaths of her own, the fifth of which calls upon her the wrath of God if her husband is telling the truth. If she refuses to take the oath, she is presumed guilty and subject to the punishment for adultery. If she takes the oath, she is declared innocent and permanently divorced from her husband. Her husband, in turn, forfeits any paternity claims over children born subsequent to their sworn oaths. See *Oxford Islamic Studies Online*, <http://www.oxfordislamicstudies.com/article/opr/t125/e1345>, accessed on November 14, 2016.

⁹ Fathurrahman Djamil, *Pengakuan Anak Luar Nikah dan Akibat Hukumnya, dalam Chuzaimah T. Yanggo dan Hafiz Ansary, Problematika Hukum Islam Kontemporer* (Jakarta: Firdaus, 2002), p. 129.

An interestingly different point of view is offered by Chatib Rasyid, a judge of religious high court of Central Java, as he believes that the legality of a marriage also is determined by whether the marriage is registered or not. Therefore, according to him, the decree of Constitutional Court Number 46/PUU-VIII/2010 especially at its definition on term “children had born out of wedlock” cannot be interpreted as children born from adultery or fornication. He argues that adultery and fornication do not include a marriage at all. In other word, adultery means no marriage. Again, it is based on the argument that marriage in Indonesia has to be held with the procedure in Article 2 paragraph (1) and (2) of Marriage Law. Rasyid believes that only if the requirements from two articles are fulfilled, the marriage can be categorized as legal. On the contrary, if the marriage is only held in accordance to Article 2 paragraph (1) then it means that marriage is held out of the procedure of Article 2 paragraph (2). The lack of the fulfillment cause the marriage falls into category of “out of wedlock”¹⁰. Therefore, Chatib Rasyid argues that “unregistered marriage” is out of wedlock, while relationship without marriage is fornication.¹¹

Due to the quite sharp controversy it caused and the importance of the issue, Majelis Ulama Indonesia (MUI, Indonesian Council of Ulama) also issued a fatwa on the matter. They state that illegitimate children mentioned in the decree of Constitutional Court are children from illegal marriage. It also states several stances regarding the issue. Through its Fatwa, Second, Provision of Law, number 5 and 6. Number 5 MUI states as follows “Government has the right to impose *ta’zir* (punishment)¹² toward their biological father by requiring him to covering living cost of the children and give wealth after his demise

¹⁰ Chatib Rasid, “Anak Lahir Di Luar Nikah (Secara Hukum) Berbeda dengan Anak Hasil Zina, Kajian Yuridis Terhadap Putusan MK NO. 46/PUU-VII/2012,” paper presented in a conference entitled Status Anak Di Luar Nikah dan Hak Keperdataan lainnya, on 10 April 2012, in IAIN Walisongo Semarang.

¹¹ Ibid.

¹² *Ta’zir* is punishment for crime not measuring up to the strict requirements of *hadd* punishments, although they are of the same nature, or those for which specific punishments have not been fixed by the Quran. Punishments range from the death penalty for espionage and heresy to flagellation, imprisonment, local banishment, and a variety of fines. Determination of punishment is left to the judge or chief executive, who can vary the punishment according to a number of criteria including who has inflicted the crime and upon whom. See *Oxford Islamic Studies Online*, <http://www.oxfordislamicstudies.com/article/opr/t125/e2363>, accessed on November 14, 2016.

through *wasiyat wajibah* (obligatory bequest)". Interestingly, MUI differentiates between obligation to give maintenance and support to the children with giving them legal relationship or the so called *nasab* (consanguinity). Point number 6 from MUI *Fatwa* that this punishment is meant to protect the children, not to validate the family lineage between the children and their biological father".¹³

If the experts' arguments are traced carefully, it can be concluded that the term "out of wedlock" refers to two major opinions; (1) that it is a relationship without marriage (adultery) and (2) that it refers to unregistered marriage. If those arguments mentioned above are tabulated, it can be seen through the table below:

Marriage status	Decree of constitutional court	Law No.1/1974	KHI	MUI	Law Experts	
					Major	Minor
Registered Marriage	Legal	Legal	Legal	Legal	All, Legal	
Unregistered Marriage	Unclear	Legal but violate the administration	Legal but violate the administration	Legal but violate the administration	Out of wedlock	Legal but violate the administration
Without Marriage	Unclear	Out of wedlock	Adultery	Adultery	All, Adultery	

The majority of law experts argue that the term "out of wedlock or without marriage" in the decree of Constitutional Court refers to unregistered marriage. However, I argue differently and believe that the term out of wedlock refers to a biological relationship between a man and a woman without a marriage bond both the unregistered and the registered. In other word, the term out of wedlock means adultery as well as fornication. The reason is that the object of problems in the case decided by the Constitutional Court is Article 43 paragraph (1) of Marriage Law which regulates the matter of illegitimate children or children born from unlawful relationship. It is not Article 2 paragraph (2) which becomes the object of problem as the Article 2 paragraph (2) (which regulates that marriage has to be recorded). Therefore, the term out of wedlock in Constitutional Court decree refers to relationship without marriage.

¹³ Fatwa of Majelis Ulama Indonesia No. 11 of 2012 Regarding the Status of Children out of Adultery and the Treatment (2012), p. 10.

The Analysis on the Decree of Constitutional Court Regarding Illegitimate Children

The Decree of Constitutional Court No. 46/PUU-VIII/2010 does not explain what is meant by illegitimate children. Seemingly, the explanation is left open for discussions among the conventional law and Islamic law. However, before stating the doctrine of law regarding the matter, it should be explained first the definition of illegitimate children which can be concluded from Article 251 and Article 263 of Civil Code. Article 251 states “*the legality of children born before the 180th day of the marriage can be denied by the husband*”. Article 254 states “*He (husband) can deny the legality of a child, born 300 days after divorce...*”.

Besides the formula regulated in the articles of Civil Code as mentioned, Islamic law also sets regulations regarding the matter. It is stated that the formula to determine the legality of a child, as explained by Juynboll, is depending on whether that child is born at least six months (180 days) after the marriage or in *iddah* (waiting period) term which is four months and ten days after the divorce. In this case, the children will be stated as legitimate children.¹⁴

Another opinion proposes a definition on children out of wedlock as children born from a mother and father without a marriage bond while each of them also is not married with anyone¹⁵. What the term is not in a marriage with anyone means is that each of them is not in a marriage previously. To give illustration, A has biological relationship with B and gives birth C, and in this case, neither A is married with D nor B is married with E.¹⁶

Another point of view states that even if the term illegitimate children or children out of wedlock in the decree is defined as children born from parents out of wedlock as explained above, illegitimate children actually children born out of unregistered marriage. The parents are religiously married, but not registered according to prescribed procedure. The decree of Constitutional Court No. 46/PUU-VIII/2010 regarding the material of Marriage Law grant the

¹⁴ Djoko Prakoso and I Ketut Murtika, *Asas asas hukum perkawinan di Indonesia* (Jakarta: Bina Aksara, 1987), p. 122.

¹⁵ Istiqamah, *Hukum Waris dan Benda* (Makassar: Alauddin University Press, 2012), p. 34.

¹⁶ Ibid.

equality in terms of position and right to both the children from registered marriage and from unregistered marriages.¹⁷

Thus, the decree of Constitutional Court brings several serious consequences. It grants family lineage between children out of wedlock with their biological father as well as establishes right and obligation between those children and their biological father; whether in form of living cost, inheritance, or others. The decree further states that this is valid if there is evidence from scientific means such as DNA test and others which proves that the concerned children do have blood relation (paternal relation) with their biological children. This is in line with Mahfud MD who states that legal provisions have the obligation to give and ensure equal protection and legal certainty toward children status and rights even though the legality of their parents is disputed.¹⁸

One strong critics to the decree is proposed by Oyo Sunaryo Mukhlas. He holds opinion that the definition of children out of wedlock in the decree of Constitutional Court is children from parents without marriage or from adultery. Here, he considers the decree of Constitutional Court Number 46/PUU-VIII/2010 too brave and confusing. He argues that the decree has ignored religious values which have to be held in high esteem since it grants equal treatment to both people who observe religious values through marriage and people who do not. The acknowledgement of legal relationship between children out of wedlock and their biological father can vary in a wide range. Too, the term can then cover children from unregistered marriage, adultery, fornication, incest, and cohabitation. Those children, due to the decree have the legal relationship with their father, mother's family and also with their biological father and biological father's family.¹⁹ Because those children will have legal relationship with father and

¹⁷ Ni Nyoman Sukerti et al., "Sikap masyarakat Hukum Adat Terhadap Putusan MK No. 46/PUU-VIII/2010 Terkait Kedudukan Anak Luar Kawin," *Journal of Master of Law Udayana*, Vol. 4, No. 3 (2015), p. 609.

¹⁸ Habib Shulton Asnawi, "Politik Hukum Putusan MK No. 46/PUU-VIII/2010 Tentang Status Anak di Luar Nikah: Upaya Membongkar Positivisme Hukum Menuju Perlindungan HAM," *Journal of Constitutional*, Volume 10, Number 2 (June 2013), p. 249.

¹⁹ Oyo Sunaryo Mukhlas, "Menakar Kekuatan dan Implikasi Putusan Mahkamah Konstitusi No 46 Tahun 2010," <http://www.fshuinsgd.ac.id/2012/12/13/menakar-kekuatan-dan-implikasi-putusan-mahkamah-konstitusi-nomor-46-tahun-2010-oleh-h-oyo-sunaryo-mukhlas1/>, accessed on November 10, 2016.

mother, Mukhlas argues that illegitimate children will only refer to children born from unregistered marriage.

Similarly, Erlina also holds opinion that children out of wedlock are children born from marriage which does not fulfill the requirements of being registered legally by the state as arranged in Article 2 paragraph (2) of the 1974 Marriage law. However, unlike Sunaryo, Erlina praises the decree. Erlina states that it is through that decree, Constitutional Court of Republic of Indonesia has been successful in giving children born from unregistered marriage access to justice they deserve. Such an access was absent previously. This is the significance of the decree lies.²⁰

Admittedly, there will be obstacles in implementing this decree. The potentials of the obstacles in the implementation of the Decree of Constitutional Court lie mainly on the views and awareness s of the legal practitioners and government officials in responding to cases of children out of wedlock. There is no guarantee that they are going to give rights to children out of wedlock without being discriminative towards them. It is undeniable that the Decree of Constitutional Court is a great cure to Iqbal's pain and many others who have the same fate. Unfortunately, the implementation of the decree so that it can function as the cure is another issue. Furthermore, since cases like Iqbal and his mother Machica Muchtar are usually are cases of polygamy, there is also issue on the protection toward the rights of women. What makes it even more complicated is that the woman here refers to both the first wife and the other wife.²¹

Another quite similar opinion is proposed by Syafran Sofyan. He believes that illegitimate children (biological children) are legal children and this means they have the right to inheritance from their biological father even without the acknowledgement and legalization with condition that the biological relationship between children and father can be proven based on scientific proof namely DNA test. However, if there is denial from the children who are legal heir, then the Court Decision regarding the status of the illegitimate children as legal heir is still needed.²² Here, it can be concluded that Safran Sofyan also argues

²⁰ Erlina, "Access To Justice 'Anak Di Luar Perkawinan', p. 52.

²¹ Ibid., p. 56.

²² Syafran Sofyan, "Putusan Mahkamah Konstitusi Tentang Status Anak Luar Kawin," <http://www.jimlyschool.com/read/analisis/256/putusan-mahkamah-konstitusi-tentang-status-anak-luar-kawin/>, accessed on November 10, 2016.

that the term children out of wedlock in the concerned Court are children born from parents with unregistered marriage.

Then, it also can be concluded that the term illegitimate children or children out of wedlock in the decree of the Constitutional Court are not children born out of wedlock, but children born from the parents who got married without proper registration. As explained by Pahlefi, the Decree of Constitutional Court Number 46/PUU-VIII/2010 implicates the status of children from unregistered marriage can have legal relationship with mother and biological father and also the family of mother and biological father. The legal relationship exists just like the existence of legal relationship of children born from legal marriage.²³

Various experts' opinions toward the definition of illegitimate children mentioned in the decree of Constitutional Court can be seen explained more systematically and more clearly in the table below.

Marriage status	Children Status						
	LAW No.1/1974	KHI	MUI	Decree Of Constitutional Court No.46/PUU-VIII/2010	Opinions from Experts of Islamic Law		Opinions From Experts of General Law
Registered Marriage	Legal	Legal	Legal	Not explained	Legal		Legal
Unregistered Marriage	Legal with limited civil rights	Legal with limited civil rights	Legal with limited civil rights	Not explained	Major Adultery	Minor Legal with limited civil rights	Major Legal with limited civil rights Minor Illegitimate Children
Without Marriage	Illegitimate Children	Adultery	Adultery	Illegitimate Children	Adultery		Illegitimate Children

As mentioned above, the indicator in measuring children out of wedlock as referred in the Decree of Constitutional Court Number 46/PUU-VIII/2010 is; (1) Children born out of wedlock; (2) Children born before 180 days (6 months) of the marriage; and (3) Children born after 300 days (10 months) after the divorce has been legalized.

²³ Pahlefi, "Implikasi Putusan Mahkamah Konstitusi No. 46/PUUVIII/2010 Terhadap Anak Dari Perkawinan Siri," *Journal of Law*, Volume 6 No. 1 (February 2015), p. 78.

The question then, what about Iqbal, the son of Machica Muchtar from her unregistered marriage with Moerdiono, whose case is the one addressed to by the decree? In this case, Machica Muchtar has proven that her marriage with Moerdiono is legal in the meaning that it is held in accordance with the religious requirements in Article 2 paragraph (1) Marriage Law. Machica's marriage does happen even though not registered by the state as sanctioned by Article 2 Paragraph (2) of the Law. Therefore, M. Iqbal Ramadhan is born from a legal marriage between Machica Muchtar with Moerdiono. AS a result, M. Iqbal Ramadhan automatically cannot defined as child born out of wedlock. He is a legal child even though the marriage of the parent is not formally recognized by the state. Moreover, M. Iqbal Ramadhan is born after 180 days (6 months) of the marriage and it is only after he has grown up that the parents are divorced. So, he also cannot fall in to category number 3 as explained above. He fulfills all of the requirements of being legitimate child and therefore cannot be called as illegitimate or adultery child.

Moreover, the object of the dispute answered and solved by the Constitutional Court is the Article 43 paragraph (1) of 1974 Marriage Law. This article regulates issue on illegitimate children or children from adultery and or children born from parents without marriage. Thus, the legal norm stated in Article 43 paragraph (1) is the ones supposed to be the consideration in the making of the decision. This is why I can conclude that the term illegitimate children or children out of wedlock referred by the concerned Court is children born without marriage, not children born from unregistered marriage as it is the case of M. Iqbal Ramadhan.

The reason some law experts wrongly interpret the intention of the decree of Constitutional Court with regards to the term "out of wedlock" as illegitimate children of adultery children is because they focus on the fact that the judicial review is requested by a child of unregistered marriage and his mother. They overlooked that the concerned Article 43 paragraph (1) Marriage Law speaks about illegitimate children of adultery children, not children of unregistered marriage.

The Term “Legal Relationship” in the Decree of Constitutional Court

The definition of “legal relationship” as referred in the Decree of Constitutional Court No. 46/PUU-VIII/2010 can be known from the very definition of private law. HFA Vollmar states that “private law is the rule of rules or norms that provides protection to the interests of private interest in the right ratio between the interests of the other interests of the people in a given society especially regarding family relationship and traffic relationship.”²⁴ Likewise, Sudikno Mertokusumo defines private law as norm regulates between individuals and regulates right and obligation of one individual to another from inside the family lineage and in intercommunication community which implementations is given to each party”.²⁵ Legal relationship as referred in the definition of private law has a wide coverage. This includes inheritance, contract, and family matters. Legal relationships between one and other individual can be indicated by whenever there are emerging rights and obligations between them, either reciprocal or unilateral.

Based of those definitions, it is safely stated that legal relationship in the family matters can be seen from the existence of the right and obligation between individuals. And, this is what the term legal relationship in the decree of Constitutional Court No. 46/PUU-VIII/2010 means. More particularly, it means that when illegitimate children or children out of wedlock have legal relationship with biological father and the family of the biological father then there are rights and duties. However, the term legal relationship between illegitimate children with their biological father as refereed in the decree of Constitutional Court is interpreted variedly by law experts because the decree does not explain in detail how far and what are the types of legal relationships. Moreover, they have different view of the meaning of “out of wedlock”.

There are many law experts who argue that legal relationship referred in the decree of Constitutional Court includes inheritance and custody. Christiana Tri Budhayati, a conventional law expert, for example, states that the Decree of Constitutional Court No. 46/PUU-VIII-2010 has offered extraordinary protection toward illegitimate

²⁴ Istiqamah, *Hukum Perdata di Indonesia* (Makassar: Alauddin University Press, 2011), p. 3.

²⁵ Ibid.

children or children out of wedlock. It granted and ensured protection for all unfortunate children in their life is by granting them legal relation with biological parent and promotes legal obligations of every parent regardless their marital status. This way, all children will get legal relationship from mother and mother's family as well as from father and father's family. So, it can be claimed that the decree of the Constitutional Court regarding the children out of wedlock has brought significant breakthrough that will change kinship law in Indonesia which implicates the applicable hereditary law.²⁶

According experts of conventional law, it should be highlighted that the legal relationship in the decree of the Constitutional Court means all kind of legal relationships between legal children and their father. In other words, there is no difference in scope and coverage of all the rights and obligations within a legal relationship between children out of wedlock with the parent and those within a legal relationship between legal children with their parent.²⁷ This is due to fact that legal consequence of the decree is the existence of family lineage between illegitimate children and their biological father which again brings consequence of the existence of rights and obligations between them. Admittedly, this is dependent on a condition that the paternal relation can be proved scientifically namely through DNA test.²⁸

However, the opinion that relationship between children out of wedlock and their biological father should include all kind and all consequences of legal relationships exactly like those within legal relationship between legal children with their father is problematic. The legal relationship referred in the decree of Constitutional Court should not include inheritance relationship, custody for illegitimate children, and consanguinity because they do not have family lineage between them. Therefore, the decree of Constitutional Court is fallible if the concerned legal relationship includes these three aspects because

²⁶ Christianiti Tri Budhayati, "Putusan MK No. 46/PUU-VIII/2010, Merombak Hukum Kekeluargaan di Indonesia," *Jurnal Refleksi Hukum* (October 2012), p. 244.

²⁷ Ni Nyoman Sukerti et al., "Sikap masyarakat Hukum Adat Terhadap Putusan MK No. 46/PUU-VIII/2010 Terkait Kedudukan Anak Luar Kawin," *Journal of Master of Law Udayana* Vol. 4, No. 3 (2015), p. 609.

²⁸ Eka N.A.M. Sihombing, "Kedudukan Anak Luar Nikah Pasca Putusan MK Nomor 46/PUU-VIII/2010," <http://sumut.kemenkumham.go.id/berita/berita-utama/399-kedudukan-anak-luar-nikah-pasca-putusan-mk-nomor-46puu-viii2010>.

those three legal relationships is only applicable as a result of a valid Islamic marriage. The obligation of Biological father is restricted to those relationships which are acceptable in Islam. Such obligations are paying for the living cost, educational cost, healthcare, *wasīyat wajībah* (obligatory bequest) instead of inheritance, donative transfer, and the obligations in taking care of the biological children.

Meanwhile, the mainstream interpretation of Islamic law has clearly set that children out of wedlock only have family lineage with their mother and has no lineage with the father. This is also the case with the child of *li'an* whose family lineage is only with his mother. This is because the family lineage of children in both cases is cut off from the father.²⁹ This position is based on several reports from the Prophet Muhammad. Similarly, Ibn al-Qayyim (1292–1350 CE), a muslim jurist from Hanbali school of law explains the diminishing of family lineage of the children from the father as a legal consequence *li'an* between a husband and wife because of certain report from the Prophet Muhammad. This view is widely held by the majority of ulama³⁰. Mushthafā al'Adawi (b. 1945 CE) for example states that “It is the opinion of the majority of ulama that the concerned children already lost their family lineage from the father based on the identical report from the Prophet Muhammad..³¹ Similarly Muhammad bin Shālih al-Utsaimīn (1925-2001 CE), a prominent Wahhabi mufti states: “Adultery children are children out of wedlock. Thus they do not have any family lineage, either to biological father or to the husband of the mother who is not the biological father. They do not have legal father³²”. As a consequence, they share similar fate with *li'an* children in term of inheritance from their biological father, they have no legal right or whatsoever.³³ Moreover, while several al-Azhar Ulama of Egypt are said to allow DNA test, Yusuf al-Qardawi, a contemporary mufti, is reported to say that DNA test cannot be resorted to determine paternal relationship for children from zina (adultery or

²⁹ Ibnu Qudamah, *al-Mughnī*, Vol IX (Beirut: Dar Alamul Kutub, 1997), p. 123.

³⁰ Ibn Qayyim al-Jawziyyah, *Zādul Ma'ād*, Vol. V (Riyad: aktabah Riyad al-Haditha, 1972), p. 357.

³¹ Mustafa al-Adawi, *Jāmi' Abkām al Nisā'*, Vol. IV (Riyad: Dar al-Sunna, 1992), p. 232.

³² Muhammad bin Shālih al-Utsaimīn, *Syarbul Mumtī'*, Vol. IV (Cairo: Dar Ibn al-Jawzi, 2009), p. 255.

³³ Qudamah, *al-Mughnī*, p. 122.

fornication). His opinion is supported by his younger contemporary Egyptian mufti, Ali Jum'ah.³⁴

From the positive law perspective, this decree of Constitutional Court only implicates to the status of children from unregistered marriage. This is so, because the judicial review was requested by the appellants in this situation. M. Iqbal Ramadhan appealed the review because he thought that his rights as legitimate son of Moerdiono were denied by the state simply because of his status as child from unregistered marriage. The implication is that they have legal relationship, both to mother and biological father and also the family of the mother and biological father. Pahlefi states that the legal relationship in this case is the same with that in legal registered marriage.³⁵ Therefore, children born from zina do not have legal relationship with their biological father. The grant by the decree only is valid for children from unregistered marriage.

Conclusion

The decree of Constitution court No. 46/PUU-VIII/2010 has certainly reshaped Indonesian family law. However, it contains some vague terms which will hamper its implementation. Many believe that the decree speaks about children of unregistered marriage. It is because the judicial review was requested by this kind of child and his mother who were denied their rights because of lack of marriage registration. However, the term 'out of wedlock' referred in the Decree of Constitutional Court No. 46/PUU-VIII/2010 should be interpreted as biological relationship without marriage, not unregistered marriage. The decree implies that children born out of wedlock are children from illegitimate relationship, namely *zina* (adultery or fornication). By the decree, these children may have limited legal relationship with their biological father and biological father's family as long as it can be proven by knowledge and technology and/or other legal evidence that they have blood relation.[]

³⁴ "Mufti Mesir Larang Penggunaan DNA untuk Tentukan Keturunan Anak Hasil Zina," <https://www.erasmuslim.com/berita/dunia-islam/mufti-mesir-larang-penggunaan-dna-untuk-tentukan-keturunan-anak-hasil-zina.htm#.WP6FbpKcHIU>, accessed on 14 of November 2016.

³⁵ Pahlefi, "Implikasi Putusan Mahkamah Konstitusi No. 46/PUUVIII/ 2010 Terhadap Anak Dari Perkawinan Siri," *Journal of Law*, Volume 6, No. 1 (February 2015), p. 78.

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